Supreme Court, U. S.
FILED
AUG 24 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Number 79-301

R & T CONSTRUCTION COMPANY, INC.,

and

DARREL S. PITTS,

Petitioners,

vs.

ST. LOUIS - SAN FRANCISCO RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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DARREL S. PITTS,

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vs.

ST. LOUIS - SAN FRANCISCO RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 24, 1979, and the denial of rehearing entered on May 30, 1979.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit wrote no opinion in denying Petitioners' petition for rehearing and petition for rehearing en banc. The notice of these denials, dated May 30, 1979, received by Petitioners, appears in Exhibit "A".

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court without opinion on April 24, 1979, and that affirmance appears at 594 F.2d 862 (5th Cir. 1979). The affirmance without opinion appears in Appendix A.

The United States District Court for the Southern District of Alabama denied Petitioners' Motion for New Trial without opinion by merely writing the words "Motion Denied" on the face of the Motion for New Trial. The Motion for New Trial with "Motion Denied" written across its face appears in Appendix B.

The United States District Court for the Southern District of Alabama wrote no opinion after trial of this matter and merely entered a judgment on the verdict returned by the jury. That judgment appears in Appendix B.

JURISDICTION

The affirmance without opinion by the United States Court of Appeals for the Fifth Circuit, which appears in Appendix A, was entered on April 24, 1979. Petitioners' petition for rehearing and petition for rehearing en banc were denied on May 30, 1979. Appendix A. The petition for writ of certiorari was filed

less than ninety days from the date rehearing was denied. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does Local Rule 21 of the United States Court of Appeals for the Fifth Circuit, which allows a case to be affirmed without opinion: (a) unduly minimize a litigant's opportunity to challenge an adverse decision, (b) impair the ability of the Supreme Court of the United States to gain the insight necessary to monitor functioning of the Court of Appeals and the propriety of its decisions, or (c) thwart a primary function of the appellate process to furnish a guide to the bench and bar in future cases?

2. Was the Trial Court's exclusion of expert opinion testimony on the grounds that such testimony invaded the province of the jury contrary to Federal Rule of Evidence 704?

STATUTES AND FEDERAL RULES INVOLVED

Federal Rules of Evidence, Rule 704:

> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Rules of the United States Court of Appeals, Fifth Circuit, Rule 21:

> "When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, or (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and the Court also determines that

no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

"In such case, the Court may in its discretion enter either of the following orders: 'AFFIRMED. See Local Rule 21,' or 'ENFORCED. See Local Rule 21.'

"See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

"Added July 1, 1970, and amended Oct. 20, 1978."

STATEMENT

This action involves a collision between a train of the St. Louis - San Francisco Railway Company (hereinafter called "the Railroad") and a truck owned by R & T Construction Company (hereinafter called "R & T") and driven by Darrel S. Pitts (hereinafter called "Pitts"). The Railroad filed its complaint in the United States District Court for the Southern District of Alabama on June 20, 1977, alleging that R & T and Pitts were negligent and/or wanton in operating the truck which collided with the train. (R. 1 - 2).

R & T and Pitts answered the Railroad's complaint alleging that the Railroad was guilty of negligence contributing to its own damages. (R. 8 - 9). R & T and Pitts also filed counterclaims against the Railroad alleging that it was negligent and/or wanton in maintaining the crossing where the collision occurred. (R. 14 - 17).

At the time of the collision, Pitts was employed by and was driving a truck owned by R & T and was hauling oil field pipe from a storage yard to a nearby oil well drilling site. (T. 616 - 620). The crossings where the collision occurred lay between the storage yard and the drilling site. Just prior to the collision, two R & T trucks, including the one being driven by Pitts, were loaded with pipe and, with several other vehicles, began the last trip of the day from the storage yard to the drilling site. (T. 619-

620). The other R & T truck crossed the railroad tracks first; and when Pitts attempted to cross the tracks, the collision with the train occurred. (T. 620-623). This was a seldom used crossing and, though Pitts had driven through the crossing many times, he had never seen a train at or near the crossing. (T. 624).

The crossing had been constructed by the Railroad in 1975. (T. 523). Even though there was testimony that there was restricted vision at the crossing, with the track emerging from an 8 to 10 foot cut with a dense growth of trees on top of the embankment just before the crossing (T. 491), the Railroad had not installed a gate or flashing light signal protection. (T. 504 - 505). It was estimated that between 700 and 1300 vehicles per day moved along the highway traversing this crossing. (T. 494).

R & T and Pitts alleged in their counterclaims that the crossing in question was unusually hazardous and that the Railroad was negligent and/or wanton in constructing and maintaining it in that condition. On the third day of trial, Mr. William Pipas was called by R & T and Pitts as an expert witness on railroad crossing safety standards and practices. Before Pipas took the stand, the Railroad raised several questions about Pipas' proposed testimony. (Beginning T. 446). The Court asked counsel for R & T if he were going to ask Pipas if the crossing was unusually hazardous, and counsel for R & T responsed that he was going to ask that question. Counsel for the Railroad immediately exclaimed that such testimony would go "to the very heart of this case", and the court agreed. (T. 450). After much discussion, the court agreed that Pipas was a qualified expert and that he could testify as an expert, but with certain crucial limitations:

"THE COURT:

"No, I am going to let you offer evidence, but I am not going to let him do this. I am not going to let him testify other than getting into this question of whether or not it was a dangerous or hazardous crossing. I really think it invades the province of the jury. He

can testify as to what is the custom and usage and what is to be at those crossings." (T. 462). (Emphasis added.)

* * * *

"THE COURT:

"Yes. And stay away from advanced warnings and stay away from crossings on the road. Stay away from the facts as to him making a judgment as to the hazardous and dangerous crossing. That is the heart of what the jury has to determine." (T. 466). (Emphasis added.)

After both sides rested, the court advised counsel that the issue of R & T's and Pitts' simple negligence would be taken from the jury and that he would hold as a matter of law that R & T and Pitts were contributorily negligent. (T. 635, 637). Closing arguments were then made (Beginning T. 665), the jury was charged (Beginning T. 728) and the jury was excused to deliberate. (T. 780). After deliberations, the jury answered the court's special interrogatories, finding that R & T and Pitts were guilty of wanton conduct which proximately contributed to the damages of the Railroad, that the Railroad was not negligent or wanton and assessing damages against R & T and Pitts at $490,000.00, and a jury verdict was returned for the Railroad in the amount of $490,000.00. (T. 784 - 786).

On March 3, 1978, R & T and Pitts filed a Motion for New Trial and Motion for Stay of Execution based in part on the Trial Court's refusal to allow the expert witness William Pipas to testify that in his opinion the crossing in question was unusually hazardous. (R. 338 - 339). This motion was denied without hearing on March 8, 1978.

On April 4, 1978, Notice of Appeal to the United States Court of Appeals for the Fifth Circuit was filed by R & T and Pitts. After extensive briefs were filed the appeal was placed on

the summary calendar whereby no oral argument was allowed, although requested by R & T and Pitts. The judgment of the Trial Court was affirmed without opinion under Local Rule 21. Petition for rehearing and petition for rehearing en banc filed by R & T and Pitts were denied without opinion.

Jurisdiction of the United States District Court for the Southern District of Alabama was invoked pursuant to 28 U.S.C. 1332.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS' PRACTICE OF AFFIRMING JUDGMENTS WITHOUT OPINION PRESENTS IMPORTANT QUESTIONS AS TO THE RESPECTIVE ROLES OF BOTH THE COURTS OF APPEAL AND OF THIS COURT IN THE ADMINISTRATION OF JUSTICE.

The United States Court of Appeals for the Fifth Circuit follows a practice of affirming certain judgments, verdicts and administrative orders without opinion. Pursuant to Rule 47 of the Federal Rules of Appellate Procedure, the Fifth Circuit has promulgated Local Rule 21 which authorizes this summary practice. Rule 21 operates when the court determines that one or more of the following circumstances exist: (1) that a judgment of the district court is based on findings of fact not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient, or (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole. If the court also determines in connection with the above that no error of law appears and an opinion would have no precedential value, no opinion is rendered. The Rule also directs parties to N.L.R.B. v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970), wherein the Fifth Circuit sets forth its rationale for adopting this Local Rule.

Local Rule 21 authorizes affirmance without opinion in the three categories of cases, if no error of law appears and an opinion would have no precedential value. Petitioners have contended throughout this appeal that the Trial Court made a basic error of law in not applying Rule 704 of the Federal Rules of Evidence; and since no order of an administrative agency or finding of fact by the Trial Court is involved in this case, and since no question of insufficiency of the evidence has been raised on this appeal, this particular case does not fall within any of the three categories of cases in which Local Rule 21 authorizes affirmance without opinion. This case is illustrative of one of the problems in the usage of Local Rule 21.

Additionally, it is Petitioners' position that this Local Rule 21 presents a significant hindrance to this Court's ability to properly supervise the administration of justice in the courts of appeal.

This Court has granted certiorari on many occasions where lower court practices posed substantial questions in the administration of justice. For example, in Linkletter v. Walker, 381 U.S. 618 (1965), certiorari was granted to resolve a conflict among the courts of appeal as to the retrospective application of one of this Court's search and seizure decisions. Certiorari was deemed necessary because the conflict created "a most troublesome question in the administration of justice". Id. at 620.

Similarly, certiorari was granted in Fong Foo v. United States, 369 U.S. 141 (1962), because the district court's practice of directing acquittals during the presentation of the government's case raised a "question of importance in the administration of justice in the federal courts". Id. at 142. And certiorari was granted to determine if immediate appeal lay from dismissal of some claims among multiple claims "because of the importance of the issue in determining appellate jurisdiction . . . ". Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 429 (1956). See also Glidden v. Zdanok, 370 U.S. 530 (1962),

where the procedure of designating judges of one court to sit in cases of another court was held to be a question of significance to the federal judicial system; and American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951), where certiorari was granted to review a removal question since "prompt, economical and sound administration of justice" depended upon a Supreme Court decision.

The Fifth Circuit's practice of affirmation without opinion presents a question of no less importance in the administration of the federal judicial system. While the rationale of the saving of judicial time is appreciated, the difficulties with summary affirmation are considerable. Local Rule 21 affects substantive rights, and is not merely an administrative or housekeeping tool. First, the reasoning of the court is shielded. The litigant thus has no meaningful opportunity to challenge an adverse decision, whether in drafting a petition for rehearing or in fashioning a petition for certiorari. The lower court and the bar receive no guidance to aid in future cases. Further, this Court's ability to scrutinize the court of appeals' decision on a petition or grant of certiorari is significantly diminished. Obviously, conflicts between circuits, within circuits, or with decisions of this Court go undetected.

Second, Local Rule 21 reduces public respect and confidence in the federal judiciary because it creates the impression of arbitrariness. The litigant who has spent thousands upon thousands of dollars in prosecuting an appeal is given no reason for the affirmance. The criminal defendant whose liberty is at stake does not have the benefit of articulated reasons for his incarceration. The fact that the Fifth Circuit denies or restricts oral argument in most cases (as was true in this instance) exacerbates the problem. See Fifth Circuit Local Rule 18. In general, the right of appeal ostensibly provided by Congress has been significantly minimized.

The problems created by the affirmance without opinion practice were studied by the Commission on Revision of the

Federal Court Appellate System. Its report was made in June, 1975, and is found at 67 F.R.D. 195 (1976). The Commission observed that opinion writing reflects certain values in the federal appellate process, namely:

> ". . . the necessity for a reasoned disposition to furnish a guide for district court judges and the bar in future cases, and the need to provide the Supreme Court with insight into the court of appeals' reasoning when the Justices consider petitions for certiorari."[1]

67 F.R.D. at 256. The Commission also noted that unexplained decisions may risk harm to public confidence in the judiciary. Thus courts should at least "issue memoranda so that they do not give the appearance to litigants of acting arbitrarily, and so that litigants may be assured that the attention of at least one judge was given to the case". Id.

The Commission therefore recommended there be some record, however brief, of the court's reasoning in every case. Mere citation to precedent, informal memoranda, unsigned and brief per curiam opinions were suggested means of accommodating the interests of the courts and litigants. Id. at 258 - 259.

---

[1] In commenting upon changes in opinion writing practices, the Commission expressed specific concern with the questioned Rule 21, observing as follows:

> "Of greater significance is the extent to which decisions are rendered without any indication of the reasoning impelling the result. In the Fifth Circuit, Local Rule 21, a relatively recent innovation, provides the judge with a form opinion, appropriate for use without variation or modification. It reads, in its entirety, 'Affirmed [Enforced]. See Local Rule 21.' Hundreds of opinions during fiscal 1974 contained no more save for citation of an opinion announcing the rule and explaining its purpose."

The Fifth Circuit has not only continued its heavy utilization of this "form opinion", but it is becoming increasingly the practice in other circuits as well.

The Commission noted:

> ". . . but in each case the litigants and their attorneys would be apprised of the reasoning which underlies the conclusion of the court". Id. at 258. (Emphasis added.)

The Fifth Circuit's practice of affirmance without opinion presents significant questions in the administration of justice in the federal judicial system. This Court should grant certiorari to address those questions.

II. THE DECISION AND RULINGS BELOW ARE IN DIRECT CONFLICT WITH FEDERAL RULE OF EVIDENCE 704. CERTIORARI SHOULD BE GRANTED TO RESOLVE THIS IMPORTANT QUESTION OF THE INTERPRETATION AND APPLICATION OF THE FEDERAL RULES OF EVIDENCE.

Federal Rule of Evidence 704 states:

> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." (Emphasis added.)

Yet, the Trial Court refused to allow Petitioners' expert witness, well qualified in the field of railroad crossing safety, to express his opinion that the railroad crossing in question was unusually hazardous. Although Petitioners' expert had been found qualified to testify as an expert witness on the subject of necessary safety precautions at railroad crossings, his testimony as to the unusually hazardous nature of this particular crossing was disallowed by the Trial Judge on the ground that such an opinion would go to the ultimate factual question and would invade the province of the jury.

Petitioners' theory at trial was that the Railroad had failed to exercise the requisite degree of care by neglecting to erect and maintain sufficient safety devices at the crossing so as to protect and warn motorists approaching the crossing. This theory was premised on the fact that a railroad may well be under a duty to provide special warnings in addition to those required by statute where the crossing is unusually hazardous. Louisville & Nashville Railroad Company v. Williams, 370 F.2d 839 (5th Cir. 1966); Callaway v. Adams, 252 Ala. 136, 40 So.2d 73 (1949).

Assuming, arguendo, that the offered opinion of Petitioners' expert (that this particular crossing was unusually hazardous) embraced an ultimate issue, the Trial Court's disallowance of this opinion as invading the province of the jury clearly shows a misapplication of, or failure to apply, Federal Rule of Evidence 704. The summary affirmance of this ruling by the Court of Appeals for the Fifth Circuit demonstrates the need for this Honorable Court to grant this petition in order to mandate compliance with the Federal Rules of Evidence.

Petitioners submit there is presented herein an important question involving the interpretation and application of Rule 704 of the Federal Rules of Evidence appropriate for review. The issuance of a Writ of Certiorari to the Court of Appeals for the Fifth Circuit is vital in order to assure the application and viability of the Federal Rules of Evidence in the district courts of this circuit.

CONCLUSION

This is an appropriate case for this Court to address the increasingly prevalent practice of the Courts of Appeals to affirm without opinion and also an opportunity to ensure the vitality of Rule 704 of the Federal Rules of Evidence.

Respectfully submitted,

BERT S. NETTLES
Post Office Box 2232
Mobile, Alabama 36601
Attorney for Petitioners
R & T Construction Company, Inc.
and Darrel S. Pitts

OF COUNSEL:

ROBERT H. ALLEN, J. HARLEY McDONALD, Jr.,
and NETTLES, COX AND BARKER
Post Office Box 2232
Mobile, Alabama 36601
For R & T Construction Company, Inc.,
and Darrel S. Pitts

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari have been served on Broox G. Holmes and Norman E. Waldrop, Jr., Attorneys for Respondent, by delivering copies to them at their office at 1101 Merchants National Bank Building, Mobile, Alabama, on the ____ day of August, 1979.

BERT S. NETTLES

APPENDIX A

OPINIONS OF THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
FIFTH CIRCUIT

Edward W. Wadsworth
Clerk

OFFICE OF THE CLERK

Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

May 30, 1979

TO ALL PARTIES LISTED BELOW:

No. 78-1830 - ST. LOUIS-SAN FRANCISCO RAILWAY CO. v. R & T CONSTRUCTION CO., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk

By Sally Hayward
Deputy Clerk

cc: Messrs. Bert S. Nettles
Robert H. Allen
J. Harley McDonald, Jr.
Messrs. Broox G. Holmes
Norman E. Waldrop, Jr.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-1830
Summary Calendar*

Do Not Publish

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation,

Plaintiff-Appellee,

versus

R & T CONSTRUCTION COMPANY, INC., a corporation, and DARREL S. PITTS, an individual,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Alabama

(APRIL 24, 1979)

Before COLEMAN, FAY and RUBIN, Circuit Judges

PER CURIAM: AFFIRMED. See Local Rule 21. [1]

*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX B

OPINIONS OF THE UNITED STATES DISTRICT

COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA.
SOUTHERN DIVISION

ST. LOUIS-SAN FRANCISCO RAILWAY CO., Plaintiff,	)	CIVIL ACTION NO. 77-340-P
vs.	)	
R & T CONSTRUCTION CO., INC., A Corporation, et al., Defendants.	)	

MOTION FOR NEW TRIAL
AND MOTION TO STAY EXECUTION

Defendants move the court to set aside the judgment entered herein on the 22nd day of February, 1978, and to grant a new trial on the following grounds:

1. That prejudicial error was committed in refusing to allow William S. Pipas, the expert witness presented by defendants, to testify that in his opinion the railroad grade crossing in question was unusually hazardous.

2. That prejudicial error was committed in refusing to allow William S. Pipas, the expert witness presented by defendants, to testify that his opinion testimony concerning the railroad grade crossing in question was based in part upon an authoritative committee report published in the proceedings of the 49th Annual Convention of the American Railway Engineering Association held in 1950, Volume 51, Page 204.

3. That prejudicial error was committed in refusing to allow William S. Pipas, the expert witness presented by defendants, to testify on re-direct examination that his opinion testimony concerning the railroad grade crossing in question was based in part upon the authoritative committee report referred to in ground 2 above even after opposing counsel had himself gone into the matter and cross-examined Mr. Pipas relative to the conclusions of a similar committee report.

4. That prejudicial error was committed in refusing to allow William S. Pipas, the expert witness presented by defendants, to testify that it was the customary standard and practice of railroads to insure that advance warning signs and pavement markings were placed at railroad grade crossings such as the one in question.

5. That prejudicial error was committed in directing the jury to find that defendants were guilty of simple negligence.

Further, defendants move the court for an order staying execution of or any proceeding to enforce the judgment entered in favor of the plaintiff herein on February 22, 1978, pending disposition of defendants' motion for a new trial.

Bert S. Nettles

Robert H. Allen

M. A. Marsal by Bert S. Nettles

Attorneys for Defendants

OF COUNSEL:

BRYAN, NELSON, NETTLES & COX
3311 First National Bank Bldg.
Mobile, Alabama 36602

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all parties in the foregoing matter with a copy of this pleading by hand delivering the same to them on this the 3rd day of March, 1978.

BERT S NETTLES

U.S. District Court Sou. Dist. Ala.
Filed in Clerk's Office
Mar 3 1978
William J. O'Connor, Clerk

Motion Denied
3/8/78
V. Pittman

IN THE UNITED STATES DISTRICT COURT FOR THE
FOR THE SOUTHERN DISTRICT OF
ALABAMA

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Plaintiff	:	CIVIL ACTION NO. 77-340-P
-vs-	:	
R & T CONSTRUCTION CO. INC., ET AL, Defendants.	:	

Now on this 16th day of February, 1978 to try the issue joined between the parties in this case comes the jury of 7 good and lawful persons, which includes 1 alternate, who were duly selected, but not sworn, on the 13th day of February, 1978. Said jury is duly sworn according to law and the trial of this case is begun.

Witnesses are examined, exhibits are offered in evidence and the trial of this case not being completed at 5:00 P.M., Court recessed to Friday, February 17, 1978 at 9:00 A.M.

Now on this 17th day of February, 1978 to try the issue joined between the parties in this case comes the jury of 7 good and lawful persons, which includes 1 alternate, who were duly sworn on the 16th day of February, 1978 and the trial of this case is resumed.

Witnesses are examined, exhibits are offered in evidence and the plaintiff rests. Witnesses are examined and exhibits offered on behalf of the defendants and the trial of this case not being completed at 5:00 P.M., Court recessed to Monday, February 20, 1978 at 9:30 A.M.

Now on this 20th day of February, 1978 to try the issue joined between the parties in this case comes the jury of 7 good and lawful persons, which includes 1 alternate, who were duly sworn on the 16th day of February, 1978 and the trial of this case is resumed. Witnesses are examined, exhibits offered in evidence and the trial of this case not being completed at 4:10 P.M., Court recessed to Tuesday, February 21, 1978 at 9:00 A.M.

Now on this the 21st day of February, 1978 to try the issue joined between the parties in this case comes the jury of 7 good and lawful persons, which includes 1 alternate, who were duly sworn on the 16th day of February, 1978 and the trial of this case is resumed. Witnesses are examined, exhibits offered in evidence and all parties rest. The trial of this case not being completed at 2:35 P.M., Court recessed to Wednesday, February 22, 1978.

Now on this 22nd day of February, 1978 to try the issue joined between the parties in this case comes the jury of 7 good and lawful persons, which includes 1 alternate, who were duly sworn on the 16th day of February, 1978 and the trial of this case is resumed. Closing arguments are made to the jury, the Court charges the jury and the jury begins their deliverations.

Now comes the jury having heard the evidence, the arguments of counsel, the charge of the Court and having considered the same upon their oaths do say:

"We, the jury find for the plaintiff, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, and against the defendants, R & T CONSTRUCTION COMPANY, INC., a corporation, and DARREL S. PITTS, and assess its damages at $490,000.00.

Nina T. Rawls
FOREMAN"

It is therefore ADJUDGED that a judgment be, and the same hereby is, entered in favor of the plaintiff, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, against the defendants, R & T CONSTRUCTION COMPANY, INC., a corporation, and DARREL S. PITTS, in the amount of

FOUR HUNDRED NINETY THOUSAND and NO/100 ($490,000.00) DOLLARS, together with costs, for which execution may issue.

Virgil Pittman
Chief Judge

U. S. DISTRICT COURT
SOU. DISTRICT OF ALABAMA
FILED AND ENTERED THIS THE
22ND DAY OF FEBRUARY, 1978
MINUTE ENTRY NO. 45,780 - B
WILLIAM J. O'CONNOR, CLERK
BY — G. Walter
Deputy Clerk

U.S. District Court Sou. Dist. Ala.
Filed in Clerk's Office
Feb 24 1978
William J. O'Connor, Clerk